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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. 335

R. H. WRIGHT, INC., and ROBERT J. HUMMEL,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No.

R. H. WRIGHT, INC., and ROBERT J. HUMMEL,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

R. H. WRIGHT, INC., a Florida corporation, and ROBERT J. HUMMEL petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, reversing the judgment of the United States District Court for the Southern District of Florida. The opinion of the Court of Appeals is appended hereto and is reported in 329 F.2d 860.

The judgment of the Court of Appeals was dated March 26, 1964. A petition for rehearing, timely filed, was denied on June 10, 1964, and the issuance of a mandate was stayed for ninety days in order to permit petitioners to apply for certiorari.

Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The question presented for review is whether the purchase of imported bitumen and its processing, storage and subsequent resale by local asphalt producers constitutes a transaction in interstate or foreign commerce within the scope of Ch. 647, 26 Stat. 209, 15 U.S.C. §1.

The statute which the case involves is set forth in the appendix.

The United States informed against R. H. Wright, Inc., South Florida Asphalt Company and East Coast Asphalt Corp., all Florida corporations, and an officer of each charging them with conspiring to restrain interstate and foreign trade in the sale and distribution of asphalt material. It was charged that substantial quantities of bitumen are purchased by wholesale distributors from foreign and out-of-state petroleum companies for re-sale; that tanker loads are regularly scheduled for shipment every four to six weeks to deep water ports in Florida; that it is delivered to temporary storage facilities into which it is pumped from the tankers and then transported by common carriers to defendants. The information also charged that the petroleum companies regularly contact the suppliers for the purpose of soliciting orders and that substantial quantities are shipped in anticipation of current supplier demand. From this the conclusion was stated that the defendants acted as conduits through which bitumen flowed in a continuous stream in foreign and interstate commerce from Venezuela and states other than Florida to its final use as a paving surface for streets, roads and driveways in Broward County, Florida.

The District Court dismissed the information holding that it failed to charge the defendants with having made

any contracts in restraint of trade or commerce within the meaning of Title 15, U.S.C. §1 (R. 88-89).

The Court of Appeals reversed, saying (R. 14-15):

> "In our opinion the information under consideration sufficiently alleged that the bitumen was shipped with a definite knowledge and understanding on the part of the producers that the defendants would purchase the same, the approximate amount that would be purchased, and approximately when such purchases would take place. Even if such shipments were not in response to direct orders from the defendants, the arrangements and understandings alleged were sufficient."

The reasons why the writ should be granted are 1) that the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court in that this Court has not held that the transactions set forth in the information are within the terms of the anti-trust laws. 2) That the decisions of this Court on the few cases comparable to this indicate that the Court of Appeals' decision is in conflict with pronouncements of this Court. In virtually all such cases the nexus which justified the holding consisted in some actual concert of action analogous to the passing of buckets of water by a fire brigade.

These statements are better demonstrated by a consideration of the information and cases.

I.

The Information Did Not Contain Sufficient Allegations That Bitumen Remained in the Flow of Commerce.

Paragraph 12 of the information (R. 12) alleged that substantial quantities of bitumen are shipped by producers in Venezuela in direct response to orders, understand-

ings or commitments by asphalt suppliers to purchase bitumen in connection with paving projects in Broward County, and in Paragraph 14 that the suppliers (meaning the local dealers) act as conduits from which the bitumen flowed in a continuous uninterrupted stream from Venezuela to the final use of the bitumen in paving surfaces in Broward County. These paragraphs begin with the word "Thus." "Thus" means "so"; "consequently"; "therefore." *Clem* v. *State*, 33 Ind. 418; *State* v. *Wines*, 47 N.J. Super. 235, 135 A.2d 543.

Accordingly, the two paragraphs around which the case is built allege, in effect, that as a result of the preceding allegations, the conclusion follows that the shipments were made in response to orders, understandings or commitments and also that the bitumen flowed in a continuous, uninterrupted stream of foreign commerce.

Therefore, these paragraphs must be considered as conclusions of the pleader and being so they are not admitted by the motions to dismiss.

In an indictment under the Sherman Act it is not sufficient to allege as a conclusion that the combination was in restraint of trade. The details must be given so as to show in what manner interstate commerce or trade was restrained. *Toulmin's Anti-Trust Laws*, Vol. 6, Sec. 12.26.

In *McJunkin* v. *Richfield Oil Corporation*, (D.C. N.D. Cal., 1940) 33 F. Supp. 466, 469, the operator of a gasoline station brought suit against the oil company, alleging a conspiracy to fix prices resulting in damages to the plaintiff. In holding that the complaint failed to state a cause of action, the Court said:

> "The complaint, it is true, states that the acts complained of were done in violation of the Sherman Act. But such an allegation, even under the liberal-

ized rules of pleading in effect since the adoption of the new Federal Rules of Civil Procedure, 28 U.S.C.A., following section 723c, cannot take the place of allegations from which it can be determined whether or not the law mentioned was in fact violated. No one would seriously contend that a complaint alleging merely that the defendant violated the Sherman Act to plaintiff's damage, would be sufficient. Neither can it be seriously contended that a complaint is sufficient which alleges merely that the defendants violated the Sherman Act in certain specified particulars which do not themselves show all the elements necessary to constitute a violation thereunder. That is the situation in this case. This action is wholly statutory and it is essential to the jurisdiction of the court that a substantial cause of action within the statute be set up by a 'short and plain statement of the claim showing that the pleader is entitled to relief.' Rule 8 (a) (2), Federal Rules of Civil Procedure."

In *United States* v. *Starlite Drive-In, Inc.*, (C.A. 7th, 1953) 204 F.2d 419, 420, the Government appealed from an order dismissing an indictment charging violations of the Sherman Act. This case is particularly persuasive "because the order was entered after oral argument, during which the District Judge expressed the view that the indictment was faulty for failure to factually allege that interstate commerce was directly affected." In affirming the judgment, the Court said:

> "The substance of defendants' argument is that the 'effects' thus alleged are mere conclusions of the pleader, without basis in the factual allegations. Such being the case, the allegations entitled 'effects' are not admitted by the motion to dismiss. We agree with this reasoning. Whether the indictment states an offense must be determined from the allegations of fact, that is, whether the agreement or combination fixing uniform prices for admission under the circumstances alleged constitutes an anti-trust violation."

The information has also other formal defects. In Paragraph 8 (R. 10) it alleges that the bitumen imported into the state was transferred to temporary storage facilities which are owned and operated by the producers and refiners "or by their terminal agents." The alternative allegations suggest that the agents may own the storage facilities in a proprietary capacity in which case the transition could not constitute a "convenient step" in the transportation.

The information is also vague and obscure in its charges (R. 11) that the bitumen is shipped to Port Everglades as a result of "orders, understandings and commitments."

Also in Paragraph 13 (R. 12) it is charged that the remaining shipments were based on "anticipation of current supplier demand, orders to be received and sales to be made."

These allegations violate Criminal Rule 7(c) which provides that the indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

The petitioners are entitled to know what factual matters they are to meet at the trial. To say that a given result flowed from orders, understandings or commitments and that shipments are based on anticipation of current supplier demand, orders to be received and sales to be made is not sufficient under the rule. Obviously, if Venezuelan shipments are made upon "orders to be received" in Port Everglades, there is no possible contractual relationship on which to base a claim that the goods flowed in interstate commerce such as appeared in the *Jacksonville Paper Company* case, *infra*, heavily relied upon by the Government.

The information in this case is vague, indefinite and ambiguous. It is destitute of any clear and concise statement of facts out of which the charges arose and the allegations are *not* admitted by the motion to dismiss.

To establish continuity, it is argued that the storage in Port Everglades was a "convenient step." The bitumen was not ordered by the petitioners, who were charged with the violation, but it was shipped into Port Everglades upon the order of the oil companies and was there stored awaiting such time as purchases were to be made by the asphalt manufacturers. There were no sale contracts involved and the asphalt manufacturers simply ordered bitumen from the oil companies as was required by their needs. Upon the order being placed, the bitumen was sold by the oil companies and delivered to the particular asphalt manufacturer. Following delivery the bitumen was mixed with aggregates and otherwise subjected to a manufacturing process by the purchaser. The finished product was then sold to any contractor who might care to order for his own use.

The whole process described in the information lacked continuity from the time the bitumen was first placed in the storage tanks at Port Everglades. There was a definite break in the flow of the bitumen once it reached the storage tanks and there was no certainty as to when the bitumen would be used, by whom it would be used, or how it would be used.

The Court below apparently treated the case as though the bitumen was like an airline passenger who, en route to his destination, is required to stop-over to await a connecting plane. This comparison would be useful except for the fact that the person who emplanes at Maracaibo is not the same one who ultimately leaves Wright's plant in

Fort Lauderdale. The tankload of bitumen which Wright buys from the terminal company at Port Everglades is not sold to the former's customers. What is sold is a different substance known as hot mix asphalt.

If the Court's position is sound then all commodities coming into the United States from foreign countries never lose their foreign-commerce character regardless of when they come to rest within the state, regardless of the fact that they never thereafter leave the state, and regardless of the fact that they lose their original identity. Here there was no continuity. The lack of it affirmatively appears from the face of the information.

In *Industrial Ass'n of San Francisco* v. *United States*, 268 U.S. 64, 78, the Court said:

> "It is true, however, that plaster, in large measure produced in other states and shipped into California, was on the list; but the evidence is that the permit requirement was confined to such plaster as previously had been brought into the state and commingled with the common mass of local property, and in respect of which, therefore, the interstate movement and the interstate commercial status had ended."

In *A. L. A. Schechter Poultry Corporation* v. *United States*, 295 U.S. 495, 543, Chief Justice Hughes said:

> "The undisputed facts thus afford no warrant for the argument that the poultry handled by defendants at their slaughterhouse markets was in a '*current*' or '*flow*' of interstate commerce, and was thus subject to congressional regulation. The mere fact that there may be a constant flow of commodities into a state does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the state and is there held solely for local disposition and use. So far as

the poultry here in question is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the state. It was not held, used, or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other states. Hence decisions which deal with a stream of interstate commerce—where goods come to rest within a state temporarily and are later to go forward in interstate commerce—and with the regulations of transactions involved in that practical continuity of movement, are not applicable here." (Emphasis by the Court)

In *Ewing-Von Allman Dairy Co.* v. *C and C Ice Cream Co.*, (C.A. 6th, 1940) 109 F.2d 898, a private action for damages, a judgment for the plaintiff was reversed. The dairy company manufactured and sold its entire output to an affiliate nationalized ice cream company, which, in turn, sold and distributed to retail dealers in Louisville, Kentucky. C and C was a retailer of ice cream in the area. The appellee alleged a violation of the Sherman Act. The sole question before the court on appeal was whether or not the appellants were subject to the Act. The opinion shows that the bulk of the raw ingredients used in the manufacture of ice cream cones came from Kentucky, but that the gelatin, fruits, flavoring and a portion of the milk which went into the manufacture of the ice cream came from outside the state. In reversing the judgment for the appellee, the Court said:

"We do not regard the transactions complained of as creating a direct and substantial burden on interstate commerce. The ingredients which came from without the state ceased to be a part of interstate commerce when manufactured and sold in Kentucky. The sales in appellants' retail stores were entirely of a local nature, made after all transportation, local and interstate, had ceased, and were beyond the regu-

latory power of Congress over interstate commerce. Foster & Kleiser Co. v. Special Site Sign Co., 9 Cir., 85 F.2d 742. Competition between the parties in Louisville and Jefferson County in no way affected interstate commerce, and the record contains no proof of conspiracy to restrain such commerce. Lipson v. Socony Vacuum Corp., 1 Cir., 85 F.2d 265."

In *U. S.* v. *Starlite Drive-In, Inc.*, (C.A. 7th, 1953) 204 F.2d 419, 422, the Court discussed the *Mandeville-Sugar* case, *infra*,* relied on by the Court below, and in the course of its opinion said:

> "* * * Neither this case nor any other, however, supports the theory advanced here that local activities are illegal simply because they concern articles which have previously moved in interstate commerce. Nor do they hold that a price-fixing agreement between local retailers dealing in a product produced in another state is illegal in the absence of a specific showing of the effect of the conspiracy on interstate commerce."

The hot mix asphalt, the result of the subsequent manufacturing process, was sold to paving contractors wholly within the Broward County area. Therefore, the petitioners' operations were local in character, were not in interstate commerce, and were not subject to the Sherman Act.

II.

The Information Did Not Sufficiently Allege That Shipments Were Made in Anticipation of Demand.

Every person in business anticipates demand; otherwise, no one would have need for inventories. The petroleum importer maintained an inventory of petroleum in

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*Mandeville Island Farms, Inc., v. American Crystal Sugar Co., 334 U.S. 219

the terminal agent's storage tanks at Port Everglades. R. H. Wright, Inc., maintained an inventory of hot mix asphalt at its plant in Fort Lauderdale. The former constituted a stock of goods of the oil company. Such stock remained in the storage tanks and was withdrawn for delivery only upon receipt of orders. Cargoes of petroleum were discharged on regular schedules. If such fact made the stream of commerce continuous within the Commerce Clause, then Federal jurisdiction is unlimited.

When the bitumen was sold and delivered, it took on, by the manufacturing process, a new identity. The time when it was to be processed, how it was to be processed and sold was subject to the judgment and whim of the manufacturer. When the manufacturing process was completed the finished product was sold only in the Broward County area.

In *Jewel Tea Co.* v. *Williams*, (C.A. 10th, 1941) 118 F.2d 202, 207, the Court said:

> " 'Where goods are ordered and shipped in interstate commerce to meet the *anticipated demands* of customers without a specific order therefor from the customer and the goods come to rest in a warehouse, the interstate commerce ceases when the goods come to rest in the state. It does not continue until the demand eventuates in the form of an order and the merchandise is delivered to the retailer.' "

Anticipation must be predicated upon more than hope, both as to time and quantity. If the idea of anticipated demands contended for by the Government to establish the existence of interstate commerce, based on hope rather than existing orders, were to prevail, it would virtually mean that if goods were once shipped in interstate commerce, then they would never lose their interstate char-

acter and thereby extend the scope of governmental regulation and control to every facet of American business.

The *Jewel Tea Company* case was followed in *Brosious* v. *Pepsi-Cola Co.*, (C.A. 3rd, 1945) 155 F.2d 99, which was an action for treble damages under the Sherman Act. Pepsi-Cola manufactured a concentrate or syrup which was shipped in containers from Long Island, New York to Pennsylvania. The concentrate was warehoused until mixed and bottled as the trade demanded through jobbers, salesmen or distributors. At the conclusion of the plaintiff's case the trial court granted a motion to dismiss.

In holding that the defendant had the right to sell to whom it chose, the Court quoted from *Jewel Tea Company*, saying:

> "When a substance is transported from one state into another, the interstate movement ends with the delivery of that substance to a distributing company. Subsequent sales and deliveries to customers of such company constitute intrastate commerce."

A similar contention as to the continuous flow and the effect of anticipated demand was made in *Lipson* v. *Socony Vacuum Corporation*, (C.A. 1st, 1937) 87 F.2d 265, 267. In affirming a judgment sustaining a motion to dismiss the complaint, the Court said:

> "(1) We are unable to agree that, as set forth in paragraph 11 of the amended declaration, the plaintiff has alleged with substantial certainty that, owing to what it terms a continuous flow of gasoline, all gasoline brought into the northeastern territory by the defendants remains in interstate commerce until it is delivered into the storage tanks of the retailer. While it is clear that the defendants must keep a supply on hand in their storage tanks to meet the fluctuations of demands of the retailers, an anticipated

demand by retail customers is not sufficient to render shipments a transaction in the course of interstate commerce until delivered to the customer whenever a demand arises. The cases which hold an order or contract for goods which necessitates a shipment in interstate commerce, and that interstate commerce continues until delivered to the customer, do not apply to anticipated demands. We do not think the Supreme Court has gone so far as to hold that, to meet the anticipated demands of customers without a specific contract therefor, interstate commerce continues until the demand eventuates in the form of an order or contract and the merchandise is delivered to the retailer."

See also *Foster & Kleiser Co.* v. *Special Site Sign Co.*, (C.A. 9th, 1936) 85 F.2d 742.

III.

The Information Did Not Sufficiently Allege the Existence of Prior Orders.

The Court below said:

"In our opinion the information under consideration sufficiently alleged that the bitumen was shipped with a definite knowledge and understanding on the part of the producers that the defendants would purchase the same, the approximate amount that would be purchased, and approximately when such purchases would take place. Even if such shipments were not in response to direct orders from the defendants, the arrangements and understandings alleged were sufficient."

Reliance is placed on *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564. This is not a Sherman Act but a Wage and

Hour decision.* However, there is nothing in the decision to support the Court's decision. Here the sole issue was whether in the case of a wholesale paper distributor which delivered goods to customers in a number of states the act applied to employees at seven branch houses which, though constantly receiving merchandise in interstate shipments and distributing it to these customers, did not ship or deliver any of it across state lines. Significantly, some of the merchandise was shipped directly from the mills to the Paper Company's customers.

In its opinion, the Court said:

> "Certainly they (the two types of transactions) cannot be distinguished from the special orders which respondent receives from its customers. Here also, a break in their physical continuity of transit is not controlling. If there is a practical continuity of movement from the manufacturers or suppliers without the state, through respondent's warehouse and on to customers whose prior orders or contracts are being filled, the interstate journey is not ended by reason of a temporary holding of the goods at the warehouse. The fact that respondent may treat the goods as stock in trade or the circumstance that title to the goods passes to respondent on the intermediate delivery does not mean that the interstate journey ends at the warehouse. The contract or understanding pursuant to which goods are ordered, like a special order, indicates where it was intended that the interstate movement should terminate. Numerous authorities are pressed on us for the contrary view and for the conclusion that when the goods enter the warehouse, they are no longer 'in commerce.'"

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*At Text 569 the Court said that in *Kirschbaum Co.* v. *Walling*, 316 U.S. 517, 520, it had stated that decisions dealing with Federal powers in the commerce field are not particularly helpful in Fair Labor Standard cases.

United States v. *Chrysler Corp.*, (C.A. 9th 1950) 180 F.2d 557, also relied on, is likewise out of point. Essentially the indictment charged Chrysler Corporation, which manufactured replacement parts in several states, with shipping these parts to its wholesalers in Washington who, in turn, resold the parts to garages, repair shops and others. It was further alleged that "(a)t various specified times and places the defendants (evidently meaning all of them) have successfully combined and conspired to raise and fix wholesale prices on parts by specified percentages, to decrease and fix wholesale discounts on parts by special percentages, and to compel authorized dealers to adhere to the prices and discounts so fixed." Obviously this arrangement could not have been made without the actual participation of the manufacturer who was unquestionably engaged in interstate commerce.

In order for the case at bar to be analogous to the *Chrysler Corporation* case the information would have had to charge that the Venezuelan producer (the Shell Oil Company) had conspired with Wright to fix the price of hot mix asphalt on sales to contractors. This the information does not do.

The information alleges (R. 11) that when contracts are awarded for asphalt materials for public and private paving projects in Broward County, the agents of the petroleum companies or their distributors communicate with the suppliers "for the purpose of soliciting or otherwise obtaining orders, understandings or commitments to purchase the bitumen required by such projects."

It then charges that such "understandings or commitments include a determination of the quantity of bitumen needed" on the project as well as "the construction timetable in order to schedule shipments * * * to meet the future requirements."

This allegation in the information is completely contradictory of the allegation in the preceding paragraph (11) that tanker loads of bitumen are "regularly scheduled for shipment and delivery every four to six weeks to the aforesaid deep water ports in Florida."

If the producers maintain a regular schedule for the shipment of bitumen from Venezuela to Florida deep water ports, including Port Everglades, how can it be said that they solicit orders for the purpose of knowing how much bitumen to deliver?

This allegation of fact in the information overrides the contention that shipments are made to Port Everglades on prior orders from R. H. Wright, Inc.

As to *Mandeville Farms, supra,* the facts are so different as to destroy the case as an analogue.

CONCLUSION.

The information wholly failed to charge a criminal violation of the Sherman Act and the District Court's judgment was correct. The opinion and judgment of the Court of Appeals should be quashed.

Respectfully submitted,

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Title 15, U.S.C.—Commerce and Trade, § 1.

"§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on convic-

tion thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, ch. 647, § 1, 26 Stat. 209; Aug. 17, 1937, ch. 690, title VIII, 50 Stat. 693; July 7, 1955, ch. 281, 69 Stat. 282.)"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19635

UNITED STATES OF AMERICA,
Appellant,

versus

SOUTH FLORIDA ASPHALT COMPANY, ET AL.,
Appellees.

Appeal from the United States District Court for the Southern District of Florida.
(March 26, 1964.)

Before TUTTLE, Chief Judge, and WISDOM and GEWIN, Circuit Judges.

GEWIN, Circuit Judge: This is an appeal by the Government from the dismissal of an information charging the defendants with engaging in a combination and conspiracy in restraint of interstate and foreign trade and commerce in the sale and distribution of "hot mix asphalt" and other materials used in road paving in violation of the Sherman Act[1] and the Clayton Act.[2]

The information alleged that the three corporate defendants are Florida Companies, referred to as "asphalt suppliers", engaged in the manufacture, sale and distribu-

1. 15 U.S.C. § 1.
2. 15 U.S.C. § 24.

tion of hot mix asphalt and other paving materials. The individual defendants are officers of the three corporations. The paving or asphalt materials are composed of rock, sand, and bitumen, the latter being a by-product obtained in refining crude oil. The bitumen used by the defendants is produced in Venezuela and other places outside of Florida, shipped into Florida by ocean tankers, and emptied into temporary storage vats to await delivery to "asphalt suppliers" such as the defendants. The temporary storage vats are owned and operated by the producers of the bitumen or their terminal agents. The bitumen is owned by the out-of-state producers until sold to the "asphalt suppliers".

Because the sufficiency of the allegations of the information are under attack, we consider it necessary to quote substantial portions of the information:

> "7. Asphalt suppliers in the Broward County area are engaged in the manufacture of hot mix asphalt and the sale and distribution of hot mix asphalt and other asphalt materials to paving contractors and other purchasers in the Broward County area. In addition to the manufacture and sale of asphalt materials, most of the asphalt suppliers in the Broward County area offer asphalt materials laid in place and perform this service as sub-contractors to paving contractors, and make a charge and obtain a profit both from the sale of said asphalt materials and from their services in laying the materials in place.
>
> "8. More than 95% of all bitumen purchased by said asphalt suppliers is purchased directly from producers and refiners of petroleum products located in Venezuela and States other than the State of Florida and is transported in interstate and foreign commerce to said asphalt suppliers through temporary storage facilities at deep-water ports along the Florida coast.

particularly Port Everglades, Florida, which temporary storage facilities are owned and operated by said producers and refiners or by their terminal agents.

"9. The remainder of the asphalt materials purchased by said asphalt suppliers is obtained from one or more wholesale distributors doing business within or in the vicinity of the Broward County area who purchase asphalt materials from the aforesaid foreign and out-of-State sources for sale to said asphalt suppliers and other customers.

"10. The transportation and handling of bitumen and most asphalt materials require that such products be maintained at a high temperature so as to maintain them in a liquid state. Bitumen is transported from the aforesaid out-of-State sources into Florida by specially equipped ocean-going tankers which are heated by steam coils to keep the asphalt at a high temperature. Tanker loads of bitumen are regularly scheduled for shipment and delivery every four to six weeks to the aforesaid deep-water ports in Florida. When the bitumen is delivered to the aforesaid temporary storage facilities, it is pumped from the tankers into specially heated tanks for delivery to asphalt suppliers and other customers. The asphalt is then transported from said facilities in trucks provided by common carriers or by customers, including defendant asphalt suppliers.

"11. In connection with the awarding of contracts and in response to purchase orders from awarding authorities to supply asphalt materials for large public and private paving projects in the Broward County area, agents of the petroleum companies or their wholesale distributors regularly contact the asphalt suppliers to whom such contracts are awarded or with whom such purchase orders are placed for the purpose of soliciting or otherwise obtaining orders, understandings, or commitments to purchase the bitumen required by such projects. Said understandings or com-

mitments include a determination of the quantity of bitumen needed to complete the project and the construction timetable in order to schedule shipments and deliveries of bitumen in sufficient quantity to meet the future requirements of such asphalt suppliers.

"12. Thus, substantial quantities of bitumen are sold and shipped by producers and refiners thereof from sources in Venezuela and States other than the State of Florida in direct response to orders, understandings, or commitments by asphalt suppliers to purchase bitumen in connection with specific paving projects in the Broward County area.

"13. In addition to the substantial quantities of bitumen shipped in interstate and foreign commerce in connection with the performance of large specific paving projects, the remaining quantity of bitumen shipped into the Broward County area from sources without the State of Florida is based on anticipation of current supplier demand, orders to be received, and sales to be made.

"14. Thus, defendant asphalt suppliers act as conduits through which bitumen flows in a continuous uniterrupted [sic] stream in foreign and interstate commerce from points of origin in Venezuela and States other than Florida to its final use in paving surfaces in the Broward County area.

"15. In the period of time from January 1, 1958 to June 1, 1961, the value of bitumen sold in the Broward County area was approximately $2,168,231.76. Of this total amount, approximately $1,839,569.75 or 85% was purchased by defendant and co-conspirator asphalt suppliers.

"16. Substantially all asphalt materials sold in the Broward County area are supplied by four asphalt suppliers: South Florida Asphalt Company, East Coast Asphalt Corp., R. H. Wright, Inc., and Weekly Asphalt Co., Inc. of Hallandale, Florida. The value of asphalt

materials sold by said companies in the Broward County area exceeded $3,300,000 in the year 1960. Of this total amount, approximately $3,000,000 or 90% was sold by the three defendant asphalt suppliers.

V

OFFENSE CHARGED

"17. Beginning in or about August, 1959, the exact date being unknown, and continuing thereafter up to and including the date of the filing of this Information, the defendants and co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of the hereinbefore-described interstate and foreign trade and commerce in the sale and distribution of asphalt materials, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", c. 647, 26 Stat. 209 (15 U.S.C. §1), as amended, commonly known as the Sherman Act.

"18. The aforesaid combination and conspiracy has consisted of a continuing agreement and concert of action among the defendants and co-conspirators, the substantial terms of which have been and are that they agree:

"(a) To raise, fix, stabilize, and maintain prices at which hot mix asphalt and other asphalt materials are sold to paving contractors in the Broward County area; and

"(b) To raise, fix, stabilize, and maintain prices at which hot mix asphalt and other asphalt materials are sold to State, county, and local governmental awarding authorities for use in the Broward County area.

"19. During the period of time covered by Count One of this Information and for the purpose of form-

ing and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators, by agreement and concert of action, have done those things which, as hereinbefore charged, they conspired and agreed to do, including, among other things, the following:

"(a) During September, 1959, defendants and co-conspirators met together and agreed to increase the price of asphalt materials to paving contractors and other customers in the Broward County area to uniform levels, effective October 1, 1959;

"(b) Pursuant to the aforesaid agreement, referred to in paragraph 19 (a) above, defendants notified paving contractors and other customers in the Broward County area by letters on September 20, 1959 through September 24, 1959, that effective October 1, 1959, the price of asphalt would be $8.25 per ton f.o.b. plant less a cash discount of 25¢ per ton if paid on or before the 10th of the month following purchase;

"(c) Thereafter, pursuant to the aforesaid agreement referred to in paragraph 19 (a) above, defendants issued to paving contractors and other customers in the Broward County area copies of a common price list quoting identical prices and terms and conditions for the sale of various quantities and thicknesses of machine-laid asphalt, together with identical prices for prime and sand; and

"(d) Thereafter, during August, 1960, defendants and co-conspirators met together and designated defendant R. H. Wright, Inc., as the supplier to submit the low bid to supply the asphalt requirements of Broward County, Florida, for the contract period September 1960 to September, 1961, determined the price to be quoted by defendant R. H. Wright, Inc., and agreed that defendant East Coast Asphalt Corp. and South Florida Asphalt Company, and other co-con-

spirator suppliers, were to submit price quotations to Broward County higher than that to be quoted by R. H. Wright, Inc.

VI

EFFECTS

"20. The effects of the aforesaid combination and conspiracy have been and are to unreasonably restrain the hereinbefore-described commerce in the sale and distribution of asphalt materials in the Broward County area by:

"(a) Increasing the prices of asphalt materials sold and distributed therein; and

"(b) Suppressing and eliminating price competition among the defendant asphalt suppliers in the sale and distribution of asphalt materials."

Certain individuals, who are officers of the corporations, were made defendants under Count One of the information, and were also charged in Count Two pursuant to the Clayton Act. The United States asserts that these allegations adequately charged the interstate nature of the commerce under each of two theories (1) the sales by the appellees are themselves alleged to be in the flow of commerce; and (2) the sales by appellees resulting from the alleged illegal combination are charged to affect interstate commerce by an illegal restraint on the sales even if they be "local" sales.

The District Court did not write an opinion, or assign specific reasons for its order, but the "order of dismissal" stated:

"*Ordered and Adjudged* that the several motions to dismiss for failure to allege a restraint of interstate or foreign commerce, and no others, are hereby granted . . ."

At the hearing, upon announcing that he was about to grant the motion, the court stated to the parties: "Why don't you and the Government sit down and dictate an order . . . You may put in what I have stated about the basic reasons." From an examination of the transcript of the short hearing, it is apparent that the deficiency in the information as ascertained by the District Court was two-fold: First, the failure to state positively that the defendants, all of whom admittedly do only intrastate business, "ordered" the bitumen from the out-of-state shipper; and secondly, in the absence of an "order" for the shipment into the state, there is nothing in the information to support a continued "flow" of commerce in view of the fact that the bitumen was deposited in storage tanks immediately upon coming into the state and was not sold or delivered directly to the defendants. In the course of the hearing, the court made the following comments:

> "The Court: Let me just say this: All goods are shipped in anticipation of demand, or all stocks are made in anticipation of demand. So any anticipation of demand does not help us any."
>
> * * *
>
> "The Court: More than that. A prior order is a direct order to bring about something. In other words, I order from you a suit of clothes and we make a contract, and then you would have to bring the suit of clothes from somewhere, from underneath the sewing machine or wherever."
>
> * * *
>
> "The Court: Down here we have continuity of movement of so many materials that they practically involve everything from desks to toothpicks, and so forth. Continuity to me means nothing unless it is a continuity within the scope of the accused."
>
> * * *

"The Court: And certainly it had come to rest. They had no control. Those big oil companies wouldn't even look at these little contractors so far as 'control' is concerned. They are insignificant."

* * *

"The Court: I say they were inconsequential. They have no control over that flow, in my opinion."

* * *

". . . And if there are orders here, as I have told you long ago, there would be no problem in this case, none whatsoever.

"Mr. Whitley: Well, I contend that there are orders charged here, Your Honor.

"The Court: I don't believe so.

"Mr. Whitley: I feel that there are orders charged there—

"The Court: I don't believe so because I don't think there were orders, just having a general knowledge of how this business goes. . . ."

* * *

"The Court: But, as I say, I don't think that has anything to do with the question before us. It isn't a prior order. . . ."

* * *

"The Court: I cannot rest my own product and get out of interstate commerce. But you can rest it. If I buy from you and it comes to rest in your hands, that is something else. . . ."

* * *

"In this case I just think there was no uninterrupted flow of commerce, and there was no commerce controlled by the defendants."

On consideration of a motion to dismiss, all well pleaded facts are taken to be true; and if the same constitute a criminal offense, the information is good and must

not be dismissed. Accordingly, we must ultimately determine whether the information sufficiently charged that the bitumer was transported into the State of Florida in response to orders, commitments, or understandings by the defendants in such fashion as to constitute a "continued flow of commerce". We conclude that the information was sufficient as a matter of law.

There are allegations of shipments in response to "orders, understandings, or commitments" and shipments based on "anticipation of supplier demand." The Supreme Court recognized in *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 87 L. Ed. 460 (1943) that a situation could arise where shipments made in "anticipation of needs of specific customers, rather than on prior orders or contracts might . . . be sufficient to establish that practical continuity in transit necessary to keep a movement of goods 'in commerce' . . . We do not believe, however, that on this phase of the case such a course of business is revealed by the record." Clearly, such a course of business is charged in the instant case, and the Government should have been given an opportunity to prove it. In *United States* v. *Chrysler Corp. Parts Wholesalers, et al.*, 180 F.2d 557 (9 Cir. 1950), the court concluded that in determining the sufficiency of an allegation that goods were shipped "in anticipation" of demands, the four corners of the indictment should be examined:

> "The goods procured 'in anticipation of' orders and demands, however, might fall short of the continuity of movement necessary to keep them in interstate commerce. We look, therefore, to other allegations to determine whether there appears some other basis on which the alleged conspiracy relating to these alleged transactions is brought within the scope of the Sherman Act

"It is well established that the commerce power of Congress, and the Sherman Act, which is a complete exercise of that power, extends to intrastate transactions which substantially affect interstate commerce. Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 68 S. Ct. 996, 92 L. Ed. 1328. We think that paragraph 21(c) of the indictment sufficiently alleges that the alleged price fixing conspiracy in its entirety had a substantial effect on interstate commerce within the scope of the Sherman Act. The allegation is not, as appellees urge, a mere conclusion of law, for it incorporates and specifies particular acts which are alleged to bring about the substantial effect. Restraints on retail sales of goods within a state which were purchased outside the state have been held to so affect interstate commerce as to be within the scope of the commerce power and the Sherman Act. United States v. General Motors, 7 Cir., 121 F.2d 376, 401-402; cf., N.L.R.B. v. Van DeKamp's, 9 Cir., 152 F.2d 818. 'The control of the handling, the sales and the prices at the place of origin * * * or in the state of destination * * * may operate directly to restrain and monopolize interstate commerce.' Local 167 v. United States, 291 U.S. 293, 297, 54 S. Ct. 396, 398, 78 L. Ed. 804. The allegations are sufficient."

In our opinion the information under consideration sufficiently alleged that the bitumen was shipped with a definite knowledge and understanding on the part of the producers that the defendants would purchase the same, the approximate amount that would be purchased, and approximately when such purchases would take place. Even if such shipments were not in response to direct orders from the defendants, the arrangements and understandings alleged were sufficient.

Not having the benefit of an opinion by the District Court, we are not sure what significance, if any, he actually placed on the fact that the bitumen was transferred from

the tanker to the storage tanks rather than directly to the defendants. At any rate, the defendants strongly urge upon us that this constitutes a break in the flow of commerce, and that the statement that the defendants "act as conduits through which bitumen flows in a continued uninterrupted stream in foreign and interstate commerce from [various places] to its final use in paving surfaces in the Broward County area", is a mere conclusion of the pleader and cannot suffice to bridge the gap. In answering this very same contention, the Ninth Circuit in *United States* v. *Chrysler, supra*, held, "Taken with other allegations we think it is a statement of an ultimate fact." In *United States* v. *Employing Plasterer's Assn.*, 347 U.S. 186, 98 L. Ed. 618 (1954), a civil action for violations of the Sherman Act, the Supreme Court held:

> "The District Court did not question that the foregoing and other factual allegations showed a combination to restrain competition among Chicago plastering contractors. But the court considered these allegations to be 'wholly a charge of local restraint and monopoly,' not reached by the Sherman Act. And the court held that there was no allegation of fact which showed that these powerful local restraints had a sufficiently adverse effect on the flow of plastering materials into Illinois. At this point we disagree. The complaint plainly charged several times that the effect of all these local restraints was to restrain interstate commerce. Whether these charges be called 'allegations of fact' or 'mere conclusions of the pleader,' we hold that they must be taken into account in deciding whether the Government is entitled to have its case tried."

The Supreme Court said in *Walling* v. *Jacksonville Paper Co.*, *supra*:

> ". . . The entry of the goods into the warehouse interrupts but does not necessarily terminate their

> interstate journey. A temporary pause in their transit does not mean that they are no longer 'in commerce' within the meaning of the Act. As in the case of an agency (cf. De Loach v. Crowley's, Inc. (CCA 5th) 128 F(2d) 378) if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended. That is sufficient. Any other test would allow formalities to conceal the continuous nature of the interstate transit which constitutes commerce."

Finally, the defendants argue that the combination and conspiracy charged is one in which they have allegedly agreed to unlawfully control only the local commerce in asphalt materials or paving materials while the only item alleged to have been shipped in interstate commerce is bitumen, a mere component of asphalt or paving materials. Although not decisive on this issue, the fact that (1) the defendants purchase 85% of the bitumen sold in the Broward County area, all of which had been in interstate commerce; and (2) the defendants sell approximately 90% of the asphalt materials sold in the Broward County area, is very important. Anyone in the area who must purchase paving materials or "hot mix asphalt" will likely be required to (1) purchase a mixture, one of the vital components of which has been in interstate commerce; and (2) make the purchase from one of defendant-conspirators. We cannot agree that no effect on interstate commerce has been charged simply because the product sold by the defendants is a manufactured product which, though composed of materials that have been in interstate commerce, is itself sold only locally. For a very thorough survey of the problems presented by con-

siderations of local manufacture and intrastate commerce versus interstate commerce, see *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 92 L. Ed. 1328 (1948). After discussing the early cases, most of which have been overruled, and some of which the appellees strongly urge upon us in this appeal, the Supreme Court there stated:

> "In view of this evolution, the inquiry whether the restraint occurs in one phase or another, interstate or intrastate, of the total economic process is now merely a preliminary step, except for those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts presented. For, given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence. If so, the restraint must fall . . ."

When we look to the four corners of the information, as was done in *Chrysler, supra*, the phrase "herein-before-described commerce" has reference to interstate commerce. The bitumen that is used in the Broward County area has unquestionably been in interstate commerce. If the allegations of the complaint are proven, the alleged acts of the appellees will have had an adverse effect on such commerce.

When enacting the Sherman and Clayton Acts, the Congress intended ". . . to go to the utmost extent of its constitutional power in restraining trust and monopoly agreements . . ." *United States* v. *South-Eastern Underwriters Assoc.*, 322 U.S. 533, 558 (1944), 88 L. Ed. 1440. See also Report of the Attorney General's National

Committee to Study the Antitrust Laws, March 31, 1955. The power exercised by Congress with respect to trusts and monopolies is comparable to its exercise of the same power in passing the National Labor Relations Act, and with respect to both types of legislation there is little question but that Congress exercised the maximum constitutional breadth permissible under the commerce clause.[3]

It is the opinion of this Court that the information taken as a whole sufficiently charges violations of the Sherman Act.

The judgment is REVERSED.

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3. See N.L.R.B. v. Reliance Fuel Oil Corp., 371 U.S. 224, 9 L.ed.2d 279:

> "This Court has consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause. See, e.g., *Guss* v. *Utah Labor Board*, 353 U.S. 1, 3; *Polish Alliance* v. *Labor Board*, 322 U.S. 643, 647-648; *Labor Board* v. *Fainblatt*, 306 U.S. 601, 607. Compare *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 480. The Act establishes a framework within which the Board is to determine whether proscribed practices would in particular situations adversely affect commerce when judged by the full reach of the constitutional power of Congress. Whether or no practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce.' "

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 335

R. H. WRIGHT, INC., AND ROBERT J. HUMMEL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A3-A17) is reported at 329 F. 2d 860. No opinion was filed by the district court in dismissing the information.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1964. On June 10, 1964, the court of ap-

peals denied petitioners' timely motion for a rehearing. On July 2, 1964, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to and including August 10, 1964. The petition was filed on July 31, 1964, and was served on August 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly held that the information, charging price-fixing in violation of the Sherman Act, sufficiently alleged a restraint of interstate or foreign commerce.

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. * * * Every person who shall make any such contract or engage in any such combination or conspiracy * * * shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

STATEMENT

On March 7, 1962, the United States of America filed an information charging three corporations and

an officer of each, including the petitioners,[1] with a conspiracy in restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The district court dismissed the information for failure to allege a restraint of interstate or foreign commerce, and the court of appeals reversed, holding that the information charged a violation of the Sherman Act.

1. *The Information.* The information charged the defendants with combining and conspiring among themselves and with other co-conspirators to raise, fix, stabilize, and maintain prices at which the defendants sold hot mix asphalt and other asphalt materials[2] to paving contractors in Broward County, Florida, and to State, county and local governmental-awarding authorities for use in that area (R. 13-14). The alleged effects of the conspiracy were an increase in the price of asphalt materials sold in the Broward County area, and the suppression and elimination of price competition among the defendant

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[1] The information named as defendants South Florida Asphalt Co. and its President, Joseph J. Packo; East Coast Asphalt Corp. and its Vice-President, Eugene G. Ballard; and R. H. Wright, Inc. and its President, Robert J. Hummel (R. 8-9). Only R. H. Wright, Inc. and Robert J. Hummel have petitioned for certiorari.

[2] "Asphalt materials" were defined in the information as paving materials derived from crude petroleum, including "hot mix asphalt" and other materials. Hot mix asphalt is made by mixing rock, sand and "bitumen." Bitumen is a heavy residue of hydrocarbons obtained as a byproduct in refining crude oil, which is used as "the binding agent" in the production of asphalt materials. See Paragraph 1 of information, R. 7.

asphalt suppliers in the sale and distribution of asphalt materials (R. 15).[3]

With respect to the restraint of interstate or foreign commerce, the information alleged that bitumen is a "vital ingredient" and "the binding agent" in the manufacture of "hot mix asphalt" which is used as a paving material for roads and highways (R. 7, 9); that more than 95 percent of all bitumen purchased by asphalt suppliers in the Broward County, Florida, area "is purchased directly from producers and refiners of petroleum products located in Venezuela and States other than Florida and is transported in interstate and foreign commerce to said asphalt suppliers through temporary storage facilities at deep water ports along the Florida coast" (R. 10); that shipments of bitumen from outside the State of Florida were scheduled by producers to meet the requirements of asphalt suppliers (R. 11-12); that "substantial quantities of bitumen" were shipped into Florida "in direct response to orders, understandings, or commitments by asphalt suppliers to purchase bitumen in connection with specific paving projects" (R. 12); that other shipments of bitumen into Florida were "based on anticipation

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[3] The information alleged that the value of the bitumen sold in the Broward County area from January 1, 1958, to June 1, 1961, "was approximately $2,168,231.76," of which 85% was purchased by "defendant and co-conspirator asphalt suppliers" (R. 12); and that the value of asphalt materials sold in the Broward County area in 1960 exceeded $3,300,000, of which "approximately $3,000,000 or 90% was sold by the three defendant asphalt suppliers" (R. 13).

of current supplier demand" (R. 12); and that defendant asphalt suppliers acted "as conduits through which bitumen flows in a continuous uninterrupted stream" from points of origin outside Florida "to its final use in paving surfaces in the Broward County area" (R. 12).

The information further alleged that the transportation and handling of bitumen required special equipment to keep it at a high temperature in order to maintain it in a liquid state; that tanker loads of bitumen were regularly delivered every four or six weeks; that the bitumen was then stored in specially heated tanks for delivery to asphalt suppliers; and that the asphalt was transported from "said facilities in trucks provided by common carriers or by customers, including defendant asphalt suppliers" (R. 11).

2. *The Proceedings Below.* The defendants moved to dismiss the information on the ground (R. 21-24; 29-35; 84-86), *inter alia*, that it failed to charge or allege facts to show that the sale and distribution of asphalt materials "is interstate and foreign or is other than local or int[ra]state in character" (R-22). The district court granted the motions, ruling from the bench that "there was no uninterrupted flow of commerce, and there was no commerce controlled by the defendants" (R. 75). The subsequent order of dismissal stated that "the information was defective in failing to allege that the defendants have engaged in any acts or combination in the form of trust or otherwise, or conspiracy or have made any contracts in restraint of trade or commerce among the several

states or with foreign nations within the meaning of [Section 1 of the Sherman Act]" (R. 89).[4]

On appeal by the United States, the Fifth Circuit reversed (Pet. A3-A17). It held that the information adequately charged a restraint of interstate or foreign commerce on two alternative theories: It held (1) that bitumen was *in* the flow of such commerce until its final use in paving surfaces in Broward County, (Pet. A13-A15); and (2) that the defendants' acts adversely *affected* such commerce (Pet. A13-A16).

ARGUMENT

In holding that the information, considered in its entirety (*United States* v. *Chrysler Corp. Parts Wholesalers*, 180 F. 2d 557, 558 (C. A. 9)), sufficiently charges a combination and conspiracy in restraint of interstate and foreign commerce, the court of appeals correctly applied settled principles governing the scope of the commerce clause. There is no occasion for further review.

The facts set forth in the information demonstrate that the defendants' alleged transactions in asphalt materials are subject to the Sherman Act because (1)

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[4] This ground was specified in the district court's order of March 28, 1962 (R. 89). A prior order of dismissal had been entered on March 16, 1962 and the United States requested clarification to indicate that the information was being dismissed solely because of the commerce issue and not on the various other grounds alleged in the motions to dismiss. The district court had indicated at argument that if reversed on the commerce point, it would proceed to trial (R. 76-77).

they are in the flow of interstate or foreign commerce; or (2) they affect such commerce.

1. Interstate or foreign commerce "is not a technical legal conception, but a practical one, drawn from the course of business"; and it is determined by "expectations" as to the eventual use of goods (*Swift & Co.* v. *United States*, 196 U.S. 375, 398). Its flow must be appraised by looking to "the usual course of the whole trade, what ultimate disposition of the product is contemplated by the business people involved" (*Northern California Pharmaceutical Ass'n* v. *United States*, 306 F. 2d 379, 387 (C.A. 9), certiorari denied, 371 U.S. 862). Here, the information alleged that bitumen was imported into Florida for ultimate use in paving surfaces, and that, defendants and other asphalt suppliers acted "as conduits" through which the bitumen flowed "in a continuous uninterrupted stream * * * to its final use" (R. 12).[5]

The continued interstate or foreign flow of the bitumen until its use in Broward County is also established by the specific supporting allegation of the information that the interstate or foreign shipments were made "in direct response to orders, understandings, or commitments by asphalt suppliers."[6]

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[5] This allegation of the information cannot be ignored, as petitioners attempt to do (Pet. 4), by designating it as a "conclusion of the pleader." As the Court stated in *United States* v. *Employing Plasterers Ass'n*, 347 U.S. 186, 188, whether charges are called "allegations of fact" or "conclusions of the pleader", they must be taken into account in deciding whether the government is entitled to a trial on the issues.

[6] Petitioners seek to dispute the factual allegations of the information, asserting that they do not order bitumen, but

This allegation is sufficient under *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 568-569, which held that a shipment remains in the flow of commerce whether shipped pursuant to "prior orders" or "pursuant to a pre-existing contract or understanding with the customer." There can be no question, as stated by the court of appeals, that "[e]ven if such [bitumen] shipments were not in response to direct orders from the defendants, the arrangements and understandings alleged were sufficient" (Pet. A13).

The continued flow of commerce is further shown by the allegation (R. 12) that the ultimate local sales by asphalt suppliers, including the defendants, were anticipated when the interstate and foreign shipments of bitumen were made. Anticipation of demand has been relied upon in numerous antitrust cases to establish that local sales were in the flow of commerce. Thus, in *Standard Oil Co.* v. *Federal Trade Commission*, 173 F. 2d 210, 213-214 (C.A. 7), affirmed on this point, reversed on other grounds, 340 U.S. 231, 238, the court stated with respect to local gasoline sales:

> Although the gasoline was not brought to River Rouge [Michigan] pursuant to orders already taken, the demands of the Michigan territory were fairly constant, and the petitioner's custo-

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rather purchase it on an occasional basis; and that, when the bitumen is brought into Florida, there is no certainty when, by whom, and how it is to be used (Pet. Br. 7). Even if these assertions were significant on the commerce issue, which we deny, the contrary allegations of the information must be assumed to be correct at this stage.

> mers' demands could be accurately estimated, so the flow of the stream of commerce kept surging from Whiting [Indiana] to Detroit [Michigan].[7]

In the instant case there were similar allegations of a "stream of commerce" in bitumen resulting from the "anticipation" by the oil companies of the "fairly constant" demands of the asphalt suppliers. The information alleges that bitumen must be kept in a liquid state at high temperatures; that storage is therefore temporary; and that new shipments of bitumen are regularly scheduled every four to six weeks for delivery to asphalt suppliers (R. 11). And since the defendant corporations and their co-conspirators allegedly purchased 85 percent of the bitumen sold in the Broward County area, it necessarily follows that most of the bitumen shipped by the oil companies into the storage tanks at Fort Everglades, Florida, would be in anticipation of their needs. Moreover, the flow of commerce plainly was not terminated by the temporary storage,[8] or by the mixing of bitumen

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[7] To the same effect are, *e.g.*, *Las Vegas Merchant Plumbers Ass'n* v. *United States*, 210 F. 2d 732, 740, (C.A. 9), certiorari denied, 348 U.S. 817; *Pevely Dairy Co.* v. *United States*, 178 F. 2d 363, 366 (C.A. 8), certiorari denied, 339 U.S. 942; *United States* v. *General Motors Corp.*, 121 F. 2d 376, 401 (C.A. 7), *certiorari denied*, 314 U.S. 618; *United States* v. *Universal Milk Bottle Service*, 85 F. Supp. 622, 629 (S.D. Ohio), affirmed, 188 F. 2d 959 (C.A. 6).

[8] *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564; *Binderup* v. *Pathe Exchange, Inc.*, 263 U.S. 291, 309; *Standard Oil Co.* v. *Federal Trade Commission*, 173 F. 2d 210, 214 (C.A. 7), affirmed on this point, reversed on other grounds, 340 U.S. 231, 238. That the interstate or foreign shipment and the

with rock and sand to make the asphalt materials which were the subject matter of the conspiracy.[9]

2. Even assuming *arguendo* that the alleged flow of commerce ended before petitioners' sales of asphalt materials, the court of appeals correctly held that the information was sufficient because it alleged an adverse effect upon commerce (Pet. A15-A16). The Sherman Act applies not only to restraints on commodities in the flow of interstate commerce, but also to local acts which substantially affect such commerce, regardless of whether the local transactions precede the shipment in interstate commerce (*Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219), occur between such shipments (*United States* v. *Women's Sportswear Manufacturers Ass'n*, 336 U.S. 460), or follow such shipments (*United States* v. *Employing Plasterers Ass'n*, 347 U.S. 186).

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storage, were done by defendants' suppliers, not by defendants, does not affect the flow of commerce. *Northern California Pharmaceutical Ass'n* v. *United States*, 306 F. 2d 379 (C.A. 9), certiorari denied, 371 U.S. 862; *Plymouth Dealers' Ass'n of Northern California* v. *United States*, 279 F. 2d 128 (C.A. 9); *Pevely Dairy Co.* v. *United States*, 178 F. 2d 363 (C.A. 8), certiorari denied, 339 U.S. 942.

[9] The interstate or foreign flow of bitumen, the "vital ingredient" in asphalt materials, is sufficient to establish Sherman Act jurisdiction over the local sales of the materials made in Florida from bitumen. See *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 238; *Plymouth Dealers' Ass'n of Northern California* v. *United States*, 279 F. 2d 128, 135 (C.A. 9); *Universal Milk Bottle Service* v. *United States*, 188 F. 2d 959, 963 (C.A. 6).

The information stated that the "effects of the aforesaid combination and conspiracy have been and are to unreasonably restrain the hereinbefore-described commerce in the sale and distribution of asphalt materials in the Broward County area" by increasing the price of asphalt material and by "suppressing and eliminating price competition among the defendant asphalt suppliers in the sale and distribution of asphalt materials" (R. 15). Such price-fixing by the defendants on their sales of asphalt materials would necessarily affect the movement or price of the constituent bitumen in its interstate or foreign flow. *United States* v. *Chrysler Corp. Parts Wholesalers*, 180 F. 2d 557, 560 (C.A. 9); *United States* v. *General Motors Corp.*, 121 F. 2d 376, 398 (C.A. 7), certiorari denied, 314 U.S. 618.[10] The indictment thus sufficiently alleges an effect upon commerce.

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[10] Having alleged a conspiracy to fix the prices of the goods in which bitumen was sold for ultimate use, it was not necessary for the information to contain additional allegations specifically directed to the effect of the local restraint upon interstate commerce, since "[a]s a matter of law, those effects are held automatically to ensue from price-fixing practices" (*United States* v. *Detroit Sheet Metal & Roofing Contractors Ass'n*, 116 F. Supp. 81, 86 (E.D. Mich.)). See also *United States* v. *General Motors Corp.*, 121 F. 2d at 398 ("any restraints affecting the retail market necessarily affect the wholesale transactions"); *United States* v. *St. Louis Dairy Co.*, 77 F. Supp. 853, 856 (E.D. Mo.), affirmed, 178 F. 2d 363 (C.A. 8), certiorari denied, 339 U.S. 942. ("[t]he control of prices 'where the interstate movement ends may operate directly to restrain * * * interstate commerce'").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. 335

R. H. WRIGHT, INC., and
ROBERT J. HUMMEL,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The Government in its Brief in Opposition contends that the information is sufficient and that certiorari should be denied on two grounds.

1. The information alleged a continuous flow of bitumen through petitioner, R. H. WRIGHT, INC., as a conduit to final use; and

2. It alleged that the petitioner's actions had an adverse effect upon commerce.

1. The Continuous Flow Theory.

The information did not properly allege that there was a continuous flow of bitumen through petitioner, R. H. Wright, Inc., as a conduit. The information (R. 12) does charge Paragraph 14:

> "Thus, defendant asphalt suppliers act as conduits through which bitumen flows in a continuous uninterrupted stream in foreign and interstate commerce from points of origin in Venezuela and States other than Florida to its final use in paving surfaces in the Broward County area."

However, this is a legal conclusion and was not admitted by the motion to dismiss (*McJunkin* v. *Richfield Oil Co.*, 55 Fed. Supp. 466, 469 (D.C. Cal. 1940).

It is not sufficient to allege that a certain combination was in restraint of trade. Details must be given so as to show in what manner interstate commerce was restrained. *Toulmin's Anti-Trust Laws,* Vol. 6, Sec. 12.26.

Remaining allegations of the information belie the charge in Paragraph 14.

Paragraph 8 (R. 10) alleges that the bitumen is transported by producers to suppliers through temporary storage facilities owned by the producers or their "terminal agents," at Florida deep water ports. Delivery to terminal agents clearly indicates that the transportation had ended. This is supported by the allegations of Paragraph 9 (R. 10) to the effect that the remainder of the asphalt materials (*i.e.* calcareous and silicious substances available in South Florida) (R. 7) were purchased by the asphalt suppliers from wholesale distributors in Broward County. Thus the information obviously relates to a subsequent mixing of the several ingredients that go to make up hot mix asphalt.

There can be no "practical continuity" as referred to in the *Walling* case, *infra*, where necessary blending occurs with other and different materials.

In holding that there was a continuity of movement the lower court collided with its own decision in *Mitchell* v. *Livingston & Thebaut Oil Company*, 256 F.2d 757 (C.A. 5th, 1958). While this case arose under the Fair Labor Standards Act[1] the court passed upon the question of continuity and held that the purchases of gasoline were made after it had come to rest same. In its opinion the Court said:

> "Similar in many respects to the case before us is Jax Beer Company v. Redfern, 5 Cir., 1941, 124 F.2d 172. Beer made in New Orleans, Louisiana, was sold and shipped to Jax Beer Company in Dallas, Texas. Shipments were by rail. In Dallas the beer was unloaded, for the most part, from the cars into the warehouse of Jax Beer Company. From the warehouse beer was delivered by Jax Beer Company in its trucks by its employees to its customers. Some times beer would be transferred directly from a railway car to a truck for delivery to a retail customer. It was contended that truck drivers of Jax Beer Company were engaged in interstate commerce and entitled to the benefits of the overtime provisions of the Fair Labor Standards Act. In the Jax Beer Company case, as in this case, it was contended that the interstate movement did not come to an end until the goods were delivered to the retailer. The district court so held. This Court rejected the conclusion and reversed the judgment. This Court determined that the work of delivering beer was not interstate in character. We think that in this case the interstate movement terminated when the gasoline was placed in Richfield's storage tanks just as in the Jax Beer Company case it terminated when the beer was

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1. 29 U.S.C. 201 (June 25, 1938, Ch. 676, Sec. 1, 52 Stat. 1060)

placed in the distributor's warehouse. See General Tobacco & Grocery Company v. Fleming, 6 Cir., 1942, 125 F.2d 596, 140 A.L.R. 783."

Respondent additionally claims that the information charges that the shipments were made "in direct response to orders, understandings, or commitments by asphalt suppliers" which it says supports the continuous flow theory.

The charge as to direct orders is as follows:

"12. Thus, substantial quantities of bitumen are sold and shipped by producers and refiners thereof from sources in Venezuela and States other than the State of Florida in direct response to orders, understandings, or commitments by asphalt suppliers to purchase bitumen in connection with specific paving projects in the Broward County area."

Paragraph 12 is plainly a conclusion of the pleader and is not admitted.

Paragraph 11 is obviously defective. It is vague, uncertain and contradictory. It attempts to charge a constant course of dealing between agents of petroleum companies and the asphalt supplier although predicated on the awarding of paving contracts by public authorities.

Respondent contends that this allegation is sufficient under *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564.

The cited case was decided under the Fair Labor Standards Act. However, there is nothing in the opinion to support the lower Court's decision.[2] In *Walling* the sole issue was whether in the case of a wholesale paper distributor which delivered goods to customers in a number

2. At Text 569 the Court said that in *Kirschbaum Co.* v. *Walling*, 216 U.S. 517, 520, it had stated that decisions dealing with Federal powers in the commerce field are not particularly helpful in Fair Labor Standard cases.

of states the act applied to employees at seven branch houses which, though constantly receiving merchandise in interstate shipments and distributing it to these customers, did not ship or deliver any of it across state lines. Significantly, some of the merchandise was shipped directly from the mills to the Paper Company's customers.

In its opinion, the Court said:

> "Certainly they (the two types of transactions) cannot be distinguished from the special orders which respondent receives from its customers. Here also, a break in their physical continuity of transit is not controlling. If there is a practical continuity of movement from the manufacturers or suppliers without the state, through respondent's warehouse and on to customers whose prior orders or contracts are being filled, the interstate journey is not ended by reason of a temporary holding of the goods at the warehouse. The fact that respondent may treat the goods as stock in trade or the circumstances that title to the goods passes to respondent on the intermediate delivery does not mean that the interstate journey ends at the warehouse. The contract or understanding pursuant to which goods are ordered, like a special order, indicates where it was intended that the interstate movement should terminate. Numerous authorities are pressed on us for the contrary view and for the conclusion that when the goods enter the warehouse, they are no longer 'in commerce'."

The *Walling* case merely holds that in such a case as the one at bar, the oil suppliers' employees would be subject to the Fair Labor Standards Act.

In *Jewel Tea Co.* v. *Williams*, 118 F.2d 202, 207 (C.A. 10th 1941), the Court said:

> "Where goods are ordered and shipped in interstate commerce to meet the *anticipated demands** of cus-

*Emphasis supplied unless noted.

> tomers without a specific order therefor from the customer and the goods come to rest in a warehouse, the interstate commerce ceased when the goods come to rest in the state. It does not continue until the demand eventuates in the form of an order and the merchandise is delivered to the retailer."

See *Brosious* v. *Pepsi-Cola Co.*, 155 F.2d 99 (C.A. 3rd, 1945).

2. The Adverse Effect upon Commerce.

The Government seems to ignore the fact that the commerce, here alleged to have been restrained, is that between Wright and its customers and not that between the oil companies and Wright. The information alleges (R. 15, p. 20):

> "The effects of the aforesaid combination and conspiracy have been and are to unreasonably restrain the hereinbefore-described commerce in the sale and distribution of asphalt materials in the Broward County area by:
>
> (a) Increasing the prices of asphalt materials sold and distributed therein; and
>
> (b) suppressing and eliminating price competition among the defendant asphalt suppliers in the sale and distribution of asphalt materials."

Nowhere is it claimed that the amount of bitumen (or petroleum) shipped into Florida was diminished by reason of any act of the petitioners. In short interstate commerce did not feel the alleged pinch.

It is this commerce and only this with which we are concerned. (*Gibbons* v. *Ogden*, 9 Wheat. 1, 195).

In *Page* v. *Work*, 290 F.2d 323, 330 (C.A. 9th, 1961) (Cert. denied 368 U.S. 323), the Court said that "the test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the con-

duct complained of affects the interstate commerce of such business."

U. S. v. *Yellow Cab Co.*, 332 U.S. 218.

In *Toulmin's Anti-Trust Laws*, Vol. 6, p. 404, Sec. 16.9, it is said:

> "A conspiracy with the ultimate object of fixing local retail prices is within the prohibition of these laws *if the means adopted* for its accomplishment *reached beyond the boundaries of one state.*"

The indictment in the instant case affirmatively alleges that the means adopted (price fixing) occurred in and affected "sales and distribution of asphalt materials in the Broward County area". Thus neither the means, nor the effect extended beyond Broward County. The alleged price fixing charged did not occur until after (a) the bitumen had come to rest in Broward County, and (b) it had been processed and manufactured into hot-mix asphalt following purchase from the suppliers. The indictment then alleges that the finished product was sold to consumers in Broward County, Florida. This charge completely negatives any idea that the transaction went beyond Broward County, much less the State of Florida. Thus, the whole operation did not transcend the boundaries of one state. The operation was strictly local and did not affect interstate commerce.

Since this is so, *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 237, heavily relied upon by the government, is of no help to it, as this Court said in that case, "(f)or this is not a case involving only 'a course of conduct wholly within a state'; it is rather one involving 'conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states,' and in such a case it is not material that the source of the forbidden

effects upon that commerce arises in one phase or another of that program."

To remedy the omission in the information, respondent says (Br. 11) that "such price-fixing by the defendants on their sales of asphalt materials would necessarily affect the movement or price of the constituent bitumen in its interstate or foreign flow."

If this is necessarily so, why was it not alleged? The argument is almost an admission that the information is defective.

Besides being a non sequitur, the argument refutes itself. If tanker loads of bitumen are regularly scheduled for shipment and delivery every four to six weeks to the deep-water ports of Florida, as alleged (R. 11), then whether or not an asphalt supplier in Broward County charges his customers a few cents more per ton for hot mix asphalt obviously cannot affect the quantity of petroleum imported into the state.

The petition should be granted.

Respectfully submitted,

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